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No. 02-857

IN THE

Supreme Court of the United States

HOUSEHOLD CREDIT SERVICES, INC. AND
MBNA AMERICA BANK, N.A.,
Petitioners,

v.

SHARON R. PFENNIG,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR AMICI CURIAE AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, MASTERCARD INTERNATIONAL INCORPORATED, AND VISA U.S.A. INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Sixth Circuit improperly substituted its interpretation of the Truth in Lending Act for that of the Federal Reserve—the agency authorized by Congress to interpret the statute—in invalidating an important provision of Regulation Z that affects tens of millions of consumer credit card agreements.

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INTEREST OF AMICI[1]

This brief is filed by the American Bankers Association ("ABA"), Consumer Bankers Association ("CBA"),

[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici*, or their members or counsel, made any monetary contribution to the preparation or submission of this brief. The written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

American Financial Services Association ("AFSA"), MasterCard International Incorporated ("MasterCard"), and Visa U.S.A. Inc. ("Visa"). The ABA is the principal national trade association of the banking industry in the United States, representing approximately 90 percent of the domestic assets of United States banks. Many ABA members issue credit cards. The CBA represents most of the nation's largest bank holding companies, institutions holding two-thirds of the industry's total assets. CBA member institutions are leaders in consumer finance, including credit cards. AFSA is a nationwide trade association that represents approximately 360 companies operating more than 10,000 offices engaged in the extension of consumer credit throughout the United States. MasterCard is a membership organization comprised of financial institutions that issue credit cards. Visa is part of a worldwide association of over 21,000 financial institutions that individually offer Visa-brand payment services, including Visa brand credit cards.

The decision below invalidated a regulation of the Federal Reserve Board, 12 C.F.R. § 226.4(c)(2), that excludes over-limit fees from the "finance charge" that a credit card issuer must disclose under the Truth in Lending Act. Members of the *amici* have relied on the Board's regulation for over two decades in disclosing the costs of consumer credit to their customers, and the decision, if it stands, will have enormous adverse financial, operational, and customer-impact consequences for these *amici* members. *Amici* and their members have long and substantial experience in dealing with the regulation at issue, and bring to this Court important perspectives on the legal rationale and justification for the regulation at issue, its impact, and its implementation.

STATEMENT

In this case, the United States Court of Appeals for the Sixth Circuit held invalid a Federal Reserve Board ("Board") regulation that had been in effect for over two decades and

governed billions of creditor disclosures during that time. The Truth in Lending Act grants the Board expansive authority to promulgate implementing regulations. Pursuant to that authority, the Board in 1981 adopted a regulation providing that when creditors impose a fee on consumers for exceeding their credit limit, creditors should not disclose that fee as part of the "finance charge." Rather, creditors must disclose the over-limit fee separately as an "other charge." Until the present lawsuit, the validity of the Board's regulation had never been questioned. Nevertheless, in this class action dispute initiated by a consumer against two creditors, the Sixth Circuit ignored the expertise of the Board and held the regulation invalid. As the petition demonstrates well, the decision of the Sixth Circuit is incorrect for a number of reasons. *Amici* submit this brief in support of the petition because the issue presented is of substantial importance to the banking industry as a whole and will have severe consequences if not reversed.

1. Congress enacted the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, in 1968 "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available . . . and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a). TILA is a disclosure statute; it does not "regulat[e] . . . the terms and conditions under which credit may be extended." H.R. Rep. No. 90-1040 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1963. Congress determined that "full disclosure would aid the consumer in deciding for himself the reasonableness of the credit charges imposed," and thereby "encourage a wiser and more judicious use of consumer credit." *Id.*

Congress also recognized that, "[b]ecause of their complexity and variety, . . . credit transactions defy exhaustive regulations by a single statute." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 559 (1980). "To accomplish its desired objective, Congress determined to lay

the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation." *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 365 (1973). TILA therefore directs the Board to "prescribe regulations to carry out the [statute's] purposes," and provides broadly that the "regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes [of the statute], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." 15 U.S.C. § 1604(a). Pursuant to this authority, the Board has issued a regulation, commonly known as Regulation Z, implementing TILA. *See* 12 C.F.R. Part 226.

Since its enactment, TILA has been amended several times. The most substantial amendments were accomplished in 1980 through the Truth in Lending Simplification and Reform Act ("Simplification Act"). *See* Pub. L. No. 96-221, Tit. VI, 94 Stat. 132, 180. Although the original TILA succeeded in many respects, Congress found that lengthy and intricate disclosures required by the statute often confused consumers. In addition, creditors "encountered increasing difficulty in keeping current with a steady stream of administrative interpretations and amendments, as well as highly technical judicial decisions." S. Rep. No. 96-73, at 2 (1979), *reprinted in* 1980 U.S.C.C.A.N. 280, 281. Despite sincere attempts to comply with TILA, creditors "found themselves in violation and subject to litigation" because of the statute's "increasing complexity and frequent changes." *Id.* Congress therefore amended TILA to, *inter alia*, "provide the consumer with clearer credit information [and] make creditor compliance easier." *Id.*; *see also* S. Rep. No. 96-368, at 16 (1979), *reprinted in* 1980 U.S.C.C.A.N. 236, 251. Following passage of the Simplification Act, the Board adopted a comprehensive revision of Regulation Z. *See* 46 Fed. Reg. 20,848 (Apr. 7, 1981). That revision included the

regulation at issue in the present case excluding over-limit fees from the "finance charge." *See* 12 C.F.R. § 226.4(c)(2).

As relevant to the present case, the current TILA regime operates in the following manner. Banks and other creditors that issue credit cards and charge cards ("issuing banks") must make disclosures to consumers on three principal occasions—in certain applications and solicitations, 15 U.S.C. § 1637(c); in initial disclosures prior to the opening of a credit plan, *id.* § 1637(a); and in periodic billing statements, *id.* § 1637(b). With regard to specified applications and solicitations, issuing banks must disclose, *inter alia*, the "annual percentage rate applicable to extensions of credit under such credit plan" and other applicable fees including "[o]ver-the-limit fee[s]." *Id.* § 1637(c)(1); *see also* 12 C.F.R. § 226.5a(b). With regard to initial disclosures, issuing banks must disclose, *inter alia*, the "conditions under which a finance charge may be imposed," the "method of determining the amount of the finance charge," the "periodic rates [that] may be used to compute the finance charge," and "other charges which may be imposed as part of the plan, and their method of computation." 15 U.S.C. § 1637(a); *see also* 12 C.F.R. § 226.6. Finally, with regard to periodic billing statements, issuing banks must disclose, *inter alia*, the "amount of any finance charge added to the account during the period," the "periodic rates [that] may be used to compute the finance charge," and "any charges other than finance charges debited to the account during the billing cycle." 15 U.S.C. § 1637(b)(4) and (5); 12 C.F.R. § 226.7(h).

The term "finance charge" thus has particular significance under TILA. Creditors must disclose significant charges imposed as a part of a credit plan either as a "finance charge" or as an "other charge." TILA provides that "the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of

credit." 15 U.S.C. § 1605(a). As part of its Regulation Z, the Board has promulgated a rule implementing this provision that lists for creditors certain definitive examples of charges that should, and should not, be included within the "finance charge." *See* 12 C.F.R. § 226.4. One subsection of that regulation—the provision at issue in this case—specifically excludes from the finance charge "[c]harges for unanticipated late payment, *for exceeding a credit limit*, or for delinquency, default, or a similar occurrence." *Id.* § 226.4(c)(2) (emphasis added).

TILA subjects creditors who violate these disclosure requirements to civil liability for actual damages, statutory damages, and reasonable attorney's fees and costs of litigation. *See* 15 U.S.C. § 1640(a). TILA limits statutory damages in class actions to the lesser of $500,000 or one per cent of the creditor's net worth. *See id.* § 1640(a)(2)(B). Recognizing that TILA is "highly technical," S. Rep. No. 93-278, at 13 (1973), Congress amended the statute to provide an exception for creditors who comply in good faith "with any rule, regulation, or interpretation thereof by the Board . . . notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason." 15 U.S.C. § 1640(f). This exception reflects Congress' determination that a creditor should not "be forced to choose between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act." S. Rep. No. 93-278, at 13.

2. Credit card accounts generally have credit limits, and it is a violation of the agreement between the customer and the issuing bank for the customer to incur charges over that

limit.[2] Credit limits are set by the bank to limit exposure if the customer does not repay. Over-limit fees serve to enforce these credit limits and compensate the bank for increased risks and costs associated with the breach of a credit limit by a customer. *See* Pet. App. A50. As the TILA legislative history notes, "over-the-limit fees . . . accrue for misuse of the account." S. Rep. No. 100-259, at 6 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3936, 3942. The same rationale underlies the authority of issuing banks to charge late fees on credit card accounts. *See id.*

When a customer presents a credit card to pay for a transaction, the merchant typically (although not always) proceeds through a Visa or MasterCard "authorization" procedure before accepting the card as payment. Authorization involves a communication between the merchant, the merchant's bank, and the Visa or MasterCard computer system, that gives the merchant's bank assurance that the credit card charge will be accepted, in the clearing process, by the bank that issued the consumer's credit card.[3] The Sixth Circuit, which refused the attempt by the Federal Reserve Board, as *amicus curiae*, to explain the matter (*see* Pet. App. A10 n.2), apparently conceived that such authorization constitutes a grant of permission by the issuing bank to the cardholder to exceed the credit limit. *See, e.g., id.* at A12-A13. The assumption is, however, entirely incorrect. The merchant authorization system is not, and

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[2] We describe here over-limit fee practices customary in connection with the credit cards accepted in the Visa and MasterCard payment systems, which is the subject of the Complaint in the present case.

[3] The VISA and MasterCard payment systems process and clear transactions among financial institution members, and are accessible only by those members. Merchants do not have direct access to the VISA and MasterCard payment systems. They make arrangements with financial institutions that are members of VISA or MasterCard, for the right to accept cards that are used in those systems.

cannot be, a means of authorizing customers to exceed their account credit limits.

First, the credit card authorization system cannot, and is not designed to, determine whether a particular charge, at a given time, will cause an account to exceed its credit limit. For a number of reasons, the authorization requests transmitted by merchants do not fully or accurately reflect the actual charges to be posted to a customer's account. In many cases, merchants do not seek authorization for charges to the customer's credit card account while, in other cases, merchants seek approval for transactions that are never carried out. It is also common for the merchant to submit a request for an amount different (either higher or lower) than the actual transaction amount. For example, some merchants submit authorization requests for only a nominal amount simply to verify that the card is "live." Other merchants (e.g., hotels and car rental companies) routinely seek authorizations substantially exceeding any predicted charge amount. Moreover, even if authorization requests fully and accurately represented the actual charges posted to a customer's account, the computer systems used for authorizations do not have continuous real-time information regarding all charges, credits, and payments on an account. Thus, at the time a merchant submits an authorization request, the issuing bank may have "in the pipeline"—but not yet reflected in the authorization system—another charge, a payment, a correction of a prior item, or a "convenience check" or cash-advance check that has not yet cleared the check-processing system. For all of these reasons, it is simply incorrect to assume that the authorization computer systems "know" whether a particular charge will cause a customer's account to exceed its credit limit.

Second, in part because of the unavailability of complete information, and in part for other reasons, issuing banks commonly give authorization for transactions even when they appear likely to be moderately over-limit (to the extent the system can so determine). Cardholders do know what

charges and payments they have actually made, and they have contractually undertaken not to exceed their credit limits. Issuing banks' authorization practices are adapted to avoid refusing to process transactions of responsible customers who are acting in accordance with what they may know to be their actual account status, for example when they know they have a payment in transit. Moreover, issuing banks commonly do not impose over-limit fees on the basis of every individual transaction that causes a customer account to exceed the credit limit at a given time. Rather, they normally impose over-limit fees only when the account balance exceeds the credit limit (or, more typically, exceeds a material margin above the credit limit) at the end of the billing cycle, or for a period of weeks or days. If a customer engages in a transaction that causes the account temporarily to exceed the credit limit (or margin) but makes a payment before the end of the billing cycle or has already made a payment yet to be received, often no over-limit fee is imposed.

Third, the authorization system does not purport to confer any rights on the customer. Visa and MasterCard established their authorization systems to allocate risk and rights *between the merchant's bank and the card-issuing bank* in the event that the issuing bank determines not to honor a charge when it is ultimately presented for payment by the merchant's bank through the clearing system. In general, the issuing bank may not refuse to accept a conforming cardholder charge that it has authorized, but the merchant's bank bears risk if there was no authorization. The cardholder is *not* a participant in these automated authorization communications, nor is the cardholder a party to the contractual relationships and allocations of risk between the merchant bank and issuing bank that are behind the authorization process. Even if the issuing bank has information that a particular charge appears likely to cause a cardholder to exceed his borrowing limit, under ordinary principles the bank's automated confirmation to a merchant

that it will accept the merchant bank's presentation of the charge does not constitute a statement by the bank to its cardholder authorizing the cardholder to exceed that limit.

3. Respondent Sharon Pfennig brought the present putative class action against petitioners Household Credit Services, Inc. and MBNA America Bank, N.A. for violation of TILA with respect to petitioners' method of disclosing over-limit fees. Respondent alleged that petitioners allowed her to exceed the $2,000 credit limit on her credit card account and then charged her an over-limit fee for every month that her balance exceeded that credit limit. *See* Pet. App. A32-A33, A39. According to respondent, petitioners' failure to identify the over-limit fee as part of the finance charge violated TILA. *Id.* at A37-A40. Respondent sought declaratory and injunctive relief, as well as actual damages, statutory damages, and attorney's fees and costs. *See id.* at A40-A41. The district court granted petitioners' motion to dismiss, holding that petitioners properly excluded the over-limit fee from the finance charge pursuant to the plain language of 12 C.F.R. § 226.4(c)(2). *See* Pet. App. at A27-A28.

The Sixth Circuit disagreed. The court conceded that petitioners imposed the over-limit fee because respondent exceeded her credit limit. *See* Pet. App. A17. The court also acknowledged that 12 C.F.R. § 226.4(c)(2) "expressly states that charges imposed for exceeding credit limits are excluded from the 'finance charge.'" Pet. App. A17. The Sixth Circuit nevertheless held that respondents should have included the over-limit fee as part of the finance charge. Based on its view that TILA must be interpreted liberally in favor of consumers, and on respondent's contention that petitioners' acceptance of her credit card charges in the authorization process "allowed" respondent to exceed her credit limit, the court concluded that the over-limit fee was "imposed as an incident to the extension of credit," and therefore fit the statutory definition of a "finance charge."

See id. at A8-A9. On this basis, the court held § 226.4(c)(2) of the Board's Regulation Z to be invalid:

> Thus, considering the language in [15 U.S.C.] § 1605(a) defining the finance charge and the language and purpose of TILA as a whole, Regulation Z's exclusion of over-limit fees, such as those imposed in this case, from the "finance charge" conflicts with the express language of TILA. In such instances, the regulation cannot stand.

Pet. App. A12. Having invalidated the regulation excluding over-limit fees from the finance charge, the Sixth Circuit enunciated a new TILA rule of its own making: When a creditor imposes an over-limit fee, that fee must be included in the finance charge if "the creditor knowingly permits the credit card holder to exceed his or her credit limit." *Id.* at A15 n.5. The decision did not state or even consider what circumstances would support a conclusion that a creditor has knowingly permitted a customer to exceed a credit limit.

Based on the TILA good-faith immunity defense of 15 U.S.C. § 1640(f), the Sixth Circuit nevertheless affirmed the dismissal of respondent's claims for monetary damages.[4] The court made one finding that was indispensable to that holding, concluding that it was "undisputed that the fee at issue in this case was imposed for 'exceeding a credit limit.'" Pet. App. A17. As a result, the fee fell within the scope of the Board's regulation excluding over-limit fees from the finance charge. As the Sixth Circuit explained, it was "beyond cavil that [petitioners] complied with Regulation Z and pursuant to 15 U.S.C. § 1640(f) should be afforded immunity from civil damages." Pet. App. A18 n.6; *see also*

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[4] The Sixth Circuit reversed the district court, however, to the extent the lower court dismissed respondent's claims for declaratory and injunctive relief. The Sixth Circuit specifically remanded the case for consideration of those equitable claims. *See* Pet. App. A19.

id. at A19 ("[Petitioners] undisputedly relied on the plain language of Regulation Z, which, although it conflicts with the plain language of TILA, expressly excludes fees charged for exceeding a credit limit from the definition of the 'finance charge.'").

SUMMARY OF ARGUMENT

For over two decades prior to the decision of the Sixth Circuit in this case, banks that issued credit cards relied on 12 C.F.R. § 226.4(c)(2) and excluded over-limit fees from the finance charge in disclosures issued pursuant to TILA, confident that their conduct conformed to the statute and would not lead to civil liability. If the Sixth Circuit decision is not reversed, that confidence will be shattered. By invalidating a regulation, the decision below creates a split in the effective law governing creditors nationwide. While the new Sixth Circuit standard regarding over-limit fees will govern in the four States of that circuit, Regulation Z will continue to apply with the force of law in all other circuits. By thus subjecting the nationwide banking industry to directly conflicting obligations in different parts of the country, the decision below will create substantial compliance problems for issuing banks. Moreover, the Sixth Circuit standard presents its own compliance obstacles. The court failed to clarify the contexts in which an over-limit fee must be included in the finance charge; and credit card authorization systems are not designed to identify precisely and contemporaneously those transactions that cause an account to exceed its credit limit and result in an over-limit fee. The Sixth Circuit decision also promises to make disclosures more difficult (rather than easier) to comprehend, thereby undermining an important objective of TILA. Finally, as the petition argues persuasively, the decision of the Sixth Circuit is wrong. TILA itself distinguishes over-limit fees from the finance charge and, in any event, the Board's regulation setting a bright-line rule to the same effect is surely a reasonable interpretation of the statute.

ARGUMENT

1. The Court should grant the petition because of the problematic legal conflict created by the decision below. The regulation at issue in this case, 12 C.F.R. § 226.4(c)(2), establishes a bright-line rule that "[c]harges . . . for exceeding a credit limit" shall be excluded from the finance charge for purposes of TILA disclosures. By invalidating that federal regulation, the Sixth Circuit has created a conflict in the effective law governing creditors' disclosure obligations nationwide. Outside the Sixth Circuit, creditors must continue to abide by § 226.4(c)(2) and disclose any over-limit fees imposed as an "other charge" separate and distinct from the finance charge. *See* 12 C.F.R. §§ 226.6(b), 226.7. In the Sixth Circuit, however, creditors are subject to a directly conflicting standard: an over-limit fee must be disclosed as part of the finance charge whenever the "creditor knowingly permit[ted] the credit card holder to exceed his or her credit limit." Pet. App. A15 n.5. Thus, regardless of whether there is a split in judicial decisions concerning the validity of § 226.4(c)(2), nationwide creditors are subjected to conflicting legal obligations.

This conflict is more than theoretical. Credit card issuers and other creditors must establish systems to ensure that solicitations, initial disclosures, and periodic billing statements all comply with two incompatible rules. This will require banks not only to identify initially which is the appropriate governing law (either Regulation Z, or else the Sixth Circuit standard) with regard to each particular customer (or individual transaction). It may also require issuing banks to revise previously-provided "initial disclosures," in all instances when the Sixth Circuit rule applies, to explain to cardholders when over-limit fees will in the future be imposed as "finance charges" and when as "other charges." Needless to say, such new processes and disclosures will be tremendously complex, uncertain, confusing to consumers, and expensive. Congress recognized in delegating broad rulemaking power to the

Board that it was important "for uniformity of application to all affected segments of the industries concerned [that] a single set of comprehensive regulations should be issued." H.R. Rep. No. 90-1040, *reprinted in* 1968 U.S.C.C.A.N. at 1975. The uniformity of application achieved by Regulation Z—and now upset by the Sixth Circuit decision—can only be preserved if this Court grants the petition.

To make matters worse for issuing banks, it is unclear when a particular disclosure is to be governed by Regulation Z, and when by the new Sixth Circuit standard. For example, the choice of which rule governs could depend on a number of possibilities, including the location of the issuing bank, the residence of the cardholder, or even the location of the court in which litigation involving an over-limit fee is initiated. If the last factor were determinative, a disclosure to a particular customer might be held unlawful no matter which rule a bank follows. TILA class actions on behalf of cardholders can be filed in district courts either within or outside the Sixth Circuit. If a class action were filed outside the Sixth Circuit, the court would presumably hold that over-limit fees are required to be *excluded* from the finance charge, as Regulation Z dictates, *see* 12 C.F.R. § 226.4(c)(2). If, however, the action were filed in a district court within the Sixth Circuit, the same over-limit fees may have to be *included* in the finance charge.[5] Issuing banks cannot comply with both rules simultaneously; but complying with *either* Regulation Z or the Sixth Circuit standard could subject them to substantial statutory damages

[5] This potential predicament is highlighted by the facts of the present case. Respondent brought a class action on behalf of *all* consumers who hold credit cards issued by petitioners and who have been subjected to an over-limit fee. *See* Pet. App. A34. Unless reviewed by this Court, the Sixth Circuit's decision may conceivably be held to govern the claims of all class members on remand regardless of whether they reside in the Sixth Circuit.

in a class action in one district or another. *See* 15 U.S.C. § 1640(a)(2)(B).[6]

2. The new Sixth Circuit standard also presents severe practical problems on its own terms. According to the decision below, creditors must disclose over-limit fees as part of the finance charge when "the creditor *knowingly permits* the credit card holder to exceed his or her credit limit." Pet. App. A15 n.5 (emphasis added). But credit card authorization systems are not today designed to create and record the kind of information necessary for such determinations. Banks may therefore be required to develop new computer systems to attempt to identify instances in which any record at the time of authorization might have reflected a potential basis for "knowing" that a transaction was over-limit, and to verify whether the transaction actually was over-limit. This, in turn, would seemingly require the development of systems capable of determining (in hindsight) whether an over-limit fee is properly attributable to a particular transaction. In those instances when an over-limit fee can be traced to a "knowing" over-limit transaction, banks' operational systems would presumably need to treat the over-limit fee as part of the "finance charge," and at the same time to treat all other over-limit fees as "other charges." The development of such new and complex systems would

[6] Apart from the fact that Regulation Z remains good law outside the Sixth Circuit, issuing banks have an additional reason to comply with 12 C.F.R. § 226.4(c)(2) in those jurisdictions. While creditors are entitled to immunity from monetary liability for actions taken in good-faith reliance on "any rule, regulation, or interpretation thereof by the Board," 15 U.S.C. § 1640(f), courts have held that TILA does not protect actions taken in reliance on *judicial* interpretations of the statute. *See, e.g., Hamilton* v. *Southern Discount Co.*, 656 F.2d 150, 152 (5th Cir. Unit B Sept. 1981). Thus, with respect to lawsuits filed outside the Sixth Circuit, only compliance with § 226.4(c)(2) would enable the banks to claim good-faith immunity under TILA. Following the Sixth Circuit standard on a nationwide basis simply is not a viable option.

impose enormous costs. Banks may therefore decide simply to change their substantive practices regarding when to apply an over-limit charge, notwithstanding the fact that TILA was not intended to govern the substantive terms of the creditor-debtor relationship.

Moreover, the new Sixth Circuit rule is unclear. It is quite certain that the Sixth Circuit has held that the Board's regulation is unlawful and "cannot stand." Pet. App. 12. But it is uncertain what the Sixth Circuit has replaced it with. The court did not indicate what it means to "knowingly permit" a customer to exceed a credit limit. *See id.* at A10 n.2. As explained above, mere authorization by an issuing bank, assuring a merchant that the bank will accept a charge, has no bearing on the quite separate contractual relationship between the issuing bank and the cardholder that obligates the cardholder to stay within his credit limit. The Sixth Circuit noted respondent's contention that petitioners permitted charges that exceeded respondent's credit limit (*see id.* at A15 n.5 (citing Complaint ¶¶ 34-35; Pet. App. A39)), yet the court reinterpreted this process as petitioners having "renegotiate[d]" the agreement with respondent. *Id.* at A13. The court did so apparently based on factual assumptions that were found nowhere in the complaint, and were contrary to the Federal Reserve's explained justification of its regulatory approach. *See, e.g., id.* at A12-A13. Because there is a difference between the authorization process as it actually works, and the Sixth Circuit's conceptions about it, it is quite unclear how the Sixth Circuit's rule is supposed to work in the world that actually exists. Absent further litigation—and the attendant risk of civil liability—banks cannot know what facts will satisfy the Sixth Circuit's "knowingly permits" standard and thereby require inclusion of an over-limit fee in the finance charge. This, in turn, will make the already complicated process of reconfiguring computer systems to account for the new Sixth Circuit standard even more difficult.

3. The practical effects of the Sixth Circuit's decision described herein also directly undermine TILA's own objectives. Congress determined—both in amending TILA to add a defense for good-faith reliance on the Board's regulations and in enacting the Simplification Act—that it should not be made difficult for creditors to determine how to comply with TILA. *See Milhollin*, 444 U.S. at 566 ("Because creditors need sure guidance through the 'highly technical' Truth in Lending Act, legislators have twice acted to promote reliance upon Federal Reserve pronouncements.") (citation omitted); S. Rep. No. 96-73, at 2, *reprinted in* 1980 U.S.C.C.A.N. at 280 (describing Simplification Act as amending the Truth in Lending Act to, *inter alia*, "make creditor compliance easier"); S. Rep. No. 93-278, at 13 ("The Truth in Lending Act is highly technical and the Committee does not believe a creditor should be forced to choose between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act."). The Sixth Circuit decision runs directly counter to this TILA objective. Not only does the decision make compliance more (not less) difficult for creditors but, by displacing a clear and uniform regulation of the Board with a vague and fact-intensive standard, it leaves creditors to guess (and litigate) about the specific contours of the new "knowingly permits" standard.

That requirements be predictable and clear, as a context for parties' transactions and communications, is one of the foremost considerations in the field of banking regulation. As this Court has recognized, "[b]anking is one of the longest regulated and most closely supervised of public callings," *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947); and in part because banking deals in intangibles, the rights, obligations, and relationships among parties are shaped by regulatory context to an extent that perhaps exceeds any other field. On many banking matters—especially patterned disclosure regimes like TILA—the predictability and clarity of bright-line rules are in many regards more important than perfect

"accuracy" of fact-specific determinations such as the Sixth Circuit may desire. Congress expressly recognized this point in enacting TILA, granting the Board broad power to promulgate regulations containing "classifications, differentiations," and "adjustments and exceptions for any class of transactions . . . to facilitate compliance therewith." 15 U.S.C. § 1604(a). The Sixth Circuit, by rejecting the bright-line approach the Board had adopted in Regulation Z's treatment of over-limit fees, disserved important congressional objectives in an area where they are most dearly needed.

Indeed, one of the most important objectives of TILA, and especially the Simplification Act, was to assure disclosure of credit terms in simple and clear forms that would enable consumers more readily to compare available credit terms. *See, e.g., id.* § 1601(a). The legislative history to the original statute noted that "[i]n many instances today, consumers do not know the costs of credit. Charges are often stated in confusing and misleading terms. . . . As a matter of fair play to the consumer, the cost of credit should be disclosed fully, simply, and clearly." H.R. Rep. No. 90-1040, *reprinted in* 1968 U.S.C.C.A.N. at 1965; *see also* S. Rep. No. 96-73, at 3, *reprinted in* 1980 U.S.C.C.A.N. at 281 (noting that one goal of Simplification Act was to "provid[e] the consumer with simpler, more understandable information"). The decision of the Sixth Circuit disserves this objective by eliminating the clear, uniform treatment of over-limit fees under 12 C.F.R. § 226.4(c)(2) in favor of a fact-specific standard that requires creditors to include over-limit fees as part of the finance charge sometimes, and exclude them from the finance charges at other times. The distinctions between the two situations will virtually never be understandable to the consumer reviewing a monthly billing statement and it will become *more* difficult for consumers to compare effectively the charges imposed by two different creditors.

4. The Court should also grant the petition because the decision of the Sixth Circuit is importantly wrong, both in substance and in failing to accord the Board's regulation the deference it is due. In invalidating 12 C.F.R. § 226.4(c)(2), the Sixth Circuit purported to find clear congressional intent where at most only ambiguity exists, and it ignored the applied expertise of the Board in an area where Congress charged the agency with unusually broad regulatory authority and discretion. The petition already demonstrates well the reasons why the decision below should be reversed, and those arguments will not be repeated here. One argument not made by the petition, however, additionally illuminates the error of the Sixth Circuit's refusal to defer to the Board.

TILA itself reflects, at the least, ambiguity regarding whether ordinary over-limit fees should be considered part of the finance charge. This ambiguity can be seen in TILA's disclosure obligations for applications and solicitations, which are found in 15 U.S.C. § 1637(c). Those requirements apply both to credit cards and charge cards, and the difference between the two is significant because the statute defines a "charge card" as "a card, plate, or other single credit device that may be used from time to time to obtain credit *which is not subject to a finance charge*." 15 U.S.C. § 1637(c)(4)(E) (emphasis added). Notwithstanding that charge cards are defined as accounts that do not have finance charges (normally these accounts are paid in full each month), TILA recognizes that over-limit fees may occur on charge cards, and it requires that solicitations and applications for charge cards disclose any "[o]ver-the-limit fee." 15 U.S.C. § 1637(c)(1)(B)(iii), (c)(4)(B)(iii). This is the only place TILA speaks to the issue, and it indicates that Congress itself conceived it rational to treat over-limit fees as not being finance charges. While these statutory provisions may not *require* the regulatory treatment of over-limit fees that the Board adopted, they surely should have caused the Sixth Circuit to recognize that the Board's regulation is reasonable and permissible under the well-established rules

governing deference to administrative rulemaking. *See, e.g.*, *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Milhollin*, 444 U.S. at 565-66.

As this Court has noted, the Board's power to promulgate regulations under TILA is even broader than that of the traditional federal agency. *See Ragsdale* v. *Wolverine World Wide, Inc.*, 122 S. Ct. 1155, 1163 (2002). Indeed, TILA provides that the Board's regulations "may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith." 15 U.S.C. § 1604(a). The Sixth Circuit erred by effectively granting no deference to the Board's reasonable interpretation here. In doing so, the decision below affects a substantial federal interest. The Board appeared as an *amicus curiae* at the rehearing stage below to make this very point. *See* Pet. App. A43-A53. The present *amici* believe that the Sixth Circuit's decision warrants review by this Court. *Amici* also concur, however, with petitioners that at a minimum the Court should call for the views of the Solicitor General to permit a presentation of the Board's perspective. *See* Pet. 3.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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